

No. 15-0146

In the Supreme Court of Texas

DORIS FORTE, O.D., ON BEHALF OF HERSELF AND ALL OTHER SIMILARLY SITUATED
PERSONS; BRIDGET LEESANG, O.D.; DAVID WIGGINS, O.D.; JOHN BOLDAN, O.D.,
Appellees,

v.

WAL-MART STORES, INCORPORATED,
Appellant.

On Certified Question from the U.S. Court of Appeals
for the Fifth Circuit, Case No. 12-40854

BRIEF OF APPELLANT

Jim E. Cowles
State Bar No. 04931000
Sim Israeloff
State Bar No. 10435380
R. Michael Northrup
State Bar No. 15103250
COWLES & THOMPSON PC
901 Main Street, Suite 3900
Dallas, TX 75202-3746
Tel.: (214) 672-2000
Fax: (214) 672-2020
jcowles@cowlesthompson.com
sisraeloff@cowlesthompson.com
mnorthrup@cowlesthompson.com

James C. Ho
State Bar No. 24052766
Prerak Shah
State Bar No. 24075053
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue, Suite 1100
Dallas, TX 75201-6912
Tel.: (214) 698-3264
Fax: (214) 571-2917
jho@gibsondunn.com
pshah@gibsondunn.com

COUNSEL FOR APPELLANT

IDENTITY OF PARTIES AND COUNSEL

Appellant	Counsel for Appellant
<p>Wal-Mart Stores, Incorporated</p>	<p><i>Appellate Counsel:</i></p> <p>James C. Ho Prerak Shah GIBSON, DUNN & CRUTCHER LLP 2100 McKinney Avenue, Suite 1100 Dallas, TX 75201-6912</p> <p><i>Trial and Appellate Counsel:</i></p> <p>Jim E. Cowles Sim Israeloff R. Michael Northrup COWLES & THOMPSON PC 901 Main Street, Suite 3900 Dallas, TX 75202-3746</p>
Appellees	Counsel for Appellees
<p>Doris Forte, O.D., on behalf of herself and all other similarly situated persons</p> <p>Bridget Leesang, O.D.</p> <p>David Wiggins, O.D.</p> <p>John Boldan, O.D.</p>	<p><i>Appellate Counsel:</i></p> <p>Russell S. Post William R. Peterson BECK REDDEN LLP 1221 McKinney, Suite 4500 Houston, Texas 77010</p> <p><i>Trial and Appellate Counsel:</i></p> <p>Hector Canales CANALES & SIMONSON, P.C. 2601 Morgan Ave. Corpus Christi, TX 78405</p> <p>Mark Burgess BURGESS LAW FIRM, P.L.L.C. 2305 Moores Lane Texarkana, TX 75503</p>

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STATEMENT OF THE CASE

- Nature of the Case:* Plaintiffs are a group of optometrists who filed a putative class action against Wal-Mart for alleged violations of the Texas Optometry Act. The United States District Court denied class certification and ordered four plaintiffs to trial. The jury found Wal-Mart liable and awarded \$3,953,000 in civil penalties. The district court remitted the award to \$1,396,400. On appeal, the U.S. Court of Appeals for the Fifth Circuit vacated the award of civil penalties. But on rehearing, the panel certified two questions to this Court.
- Trial Court:* United States District Court for the Southern District of Texas (Judge Hayden Head).
- Trial Court Disposition:* Jury verdict in favor of Plaintiffs. Court denied Defendant's motion for judgment as a matter of law, and remitted damages award.
- Parties in the Court of Appeals:* *Appellant:*
Wal-Mart Stores, Incorporated.
- Appellees:*
Doris Forte, O.D., on behalf of herself and all other similarly situated persons; Bridget Leesang, O.D.; David Wiggins, O.D.; and John Boldan, O.D.
- Court of Appeals:* U.S. Court of Appeals for the Fifth Circuit.
- Panel:* Jolly, J., joined by Stewart, C.J., and Smith, J.
- Citation:* *Forte v. Wal-Mart Stores, Inc.*, 780 F.3d 272 (5th Cir. 2015).
- Court of Appeals Disposition:* On panel rehearing, certified two questions to the Supreme Court of Texas.

STATEMENT OF JURISDICTION

This Court has jurisdiction to answer dispositive questions certified to it by the U.S. Court of Appeals for the Fifth Circuit, pursuant to Article 5, Section 3-c of the Texas Constitution and Rule 58 of the Texas Rules of Appellate Procedure.

ISSUES PRESENTED

The U.S. Court of Appeals for the Fifth Circuit certified the following questions to this Court:

For the reasons discussed above, we hereby certify the following determinative questions of Texas law to the Supreme Court of Texas:

1. Whether an action for a “civil penalty” under the Texas Optometry Act is an “action in which a claimant seeks damages relating to a cause of action” within the meaning of Chapter 41 of the Texas Civil Practice and Remedies Code. In other words, are civil penalties awarded under Tex. Occ. Code § 351.605 “damages” as that term is used in Tex. Civ. Prac. & Rem. Code § 41.002(a).

2. If civil penalties awarded under the Texas Optometry Act are “damages” as that term is used in Tex. Civ. Prac. & Rem. Code § 41.002(a), whether they are “exemplary damages” such that Tex. Civ. Prac. & Rem. Code § 41.004(a) precludes their recovery in any case where a plaintiff does not receive damages other than nominal damages.

We disclaim any intention or desire that the Supreme Court of Texas confine its reply to the precise form or scope of the questions certified.

Forte, 780 F.3d at 283.

INTRODUCTION

The Texas Legislature enacted tort reform statutes like Chapter 41 of the Civil Practice and Remedies Code to deal with lawsuits just like this. Plaintiffs suffered no actual damages—indeed, they did not even seek any actual damages. They sued in the hope that a jury would nevertheless award them a windfall verdict in the form of a multi-million dollar civil penalty—notwithstanding the undisputed absence of any actual damages. But the Legislature enacted Chapter 41 precisely to stop juries and trial courts from awarding such windfalls, absent express statutory authorization to the contrary.

Wal-Mart leases space in their stores to optometrists. This practice benefits optometrists, patients, and the company alike. As part of its leasing practice, Wal-Mart asked the optometrists to choose what hours they planned to keep their offices open, and to write those hours in their lease. That allowed Wal-Mart to inform its customers when someone would be available in the optometrist's office, either to schedule a future appointment, or to request a walk-in appointment in the event the optometrist happens to be available at that moment.

Plaintiffs brought suit on the theory that this entirely reasonable practice was somehow banned by the Texas Legislature—even though, as the record of this case demonstrates, the practice did not harm any patient or optometrist, or otherwise affect the professional medical judgment of the optometrist.

What's more, Plaintiffs and their class action counsel sought hundreds of millions of dollars in civil penalties on behalf of every single optometrist that has signed a lease with Wal-Mart in Texas since 2003—despite the absence of any actual damages suffered by any patient or optometrist. The district court denied class certification and instead proceeded to trial on a test case using four individual plaintiffs. A jury awarded millions of dollars to those four plaintiffs. The district court described the verdict as “stunning.” It was “the highest verdict that’s been reached in this court,” and “a case that is not worthy of the highest verdict that’s been reached.” Even Plaintiffs later acknowledged concerns that they had received a “windfall.”

The Texas Legislature has codified various measures to prevent litigation abuses such as this case. Chapter 41 is the expression of a simple legal principle: If a plaintiff does not receive compensation for actual damages, then the plaintiff should not receive exemplary damages either.

That principle applies here. Indeed, the entire purpose of Chapter 41 is to prevent the plaintiffs’ bar from obtaining windfall verdicts just like the one that Plaintiffs received here—and that their counsel could seek for over 400 other optometrists—unless this Court stops them.

STATEMENT OF FACTS

Optometrists are medical professionals—licensed to examine eyes, treat vision disorders, and prescribe lenses for visual defects. *See* TEX. OCC. CODE § 351.002(6). As medical professionals, they are legally and ethically bound to exercise their best professional judgment in caring for their patients.

Toward that end, Texas law prohibits corporations from controlling the professional judgment and practice of optometrists—including by influencing the hours of optometrists. *See* TEX. OCC. CODE §§ 351.363, .408. These prohibitions exist for the simple reason that, as medical professionals, optometrists must be motivated by what is best for the patient—not profit—when they provide optometric services.

Plaintiffs claim that Wal-Mart somehow violated these provisions based on how the company leases space to optometrists. The leases ask optometrists to list what hours they intend to keep their offices open. Plaintiffs claim that this modest act—no different from what any commercial lessor asks of any tenant—violates the Texas Optometry Act, and entitles them to millions of dollars in civil penalties. But Wal-Mart's leasing practices did not harm any patient or optometrist, and in no way controlled or interfered with the medical judgment or practice of any optometrist.

I. Wal-Mart’s Leasing Practices Expand Access To Health Care, Particularly In Smaller Communities, While Enabling Optometrists To Practice Their Profession With A Steady Stream Of Patients.

Wal-Mart’s practice of leasing retail space in its superstores for optometric services benefits both patients and optometrists alike.

To begin with, Wal-Mart operates superstores in numerous locations throughout the country—including many in rural and other underserved areas. By leasing space to optometrists, Wal-Mart has “allowed eyecare to be expanded into smaller communities that might not otherwise have it.” R. 7339.¹

In addition to expanding access to underserved populations, Wal-Mart provides convenience to all patients: A customer can see an optometrist, receive a prescription, and then walk next door to a Wal-Mart Vision Center and purchase glasses, contact lenses, or other similar products from a Wal-Mart optician. *See* R. 7176-77; R. 6412 (Wal-Mart leases provide “huge convenience” to patients).

Optometrists benefit, too. Expanding access for the underserved helps optometrists by providing them with a new population of patients who might otherwise not seek optometric care. *See* R. 7008. Wal-Mart also provides and maintains the facilities—including “upgraded” medical equipment, R. 7335—pays for the utilities, and provides a “built in” flow of patient traffic from Wal-Mart

¹ “R. ___” refers to the appropriate page in the record on appeal filed in the Fifth Circuit.

customers. *See, e.g.*, R. 6669-70. *See also* R. 6635, 6671-72 (Dr. Wiggins desired a Wal-Mart lease to ensure a “steady source of patients,” because his previous job location “didn’t have enough traffic”).

As a result, optometrists who lease space from Wal-Mart enjoy significant annual incomes. *See, e.g.*, R. 6361 (Dr. Boldan: “right around 200,000” a year); R. 6483-84 (Dr. Forte: “about \$200,000” per year, more than “at the other places”); R. 6527 (Dr. LeeSang: “maybe 200,000; maybe more” per year).

Not surprisingly, then, Wal-Mart leases are popular with optometrists. More than 300 optometrists lease space from Wal-Mart in Texas. R. 7188. And Wal-Mart’s optometrist tenants in Texas report the highest level of satisfaction of all Wal-Mart’s optometrist tenants nationwide. R. 7338. Indeed, Plaintiffs themselves recognized the “mutual benefit” of their own relationships with Wal-Mart. *See, e.g.*, R. 6648; R. 6749; R. 6425.

II. The Record Demonstrates That Wal-Mart’s Leasing Practices Did Not Harm Any Patients Or Optometrists Or Otherwise Affect Their Professional Judgment Or Practice.

Wal-Mart’s leases asked optometrists to represent how long they intended their offices to be open each week. This practice allowed Wal-Mart to inform its customers when someone would be available in the optometrist’s office, either to talk with prospective patients and schedule future appointments with the optometrist—or even to accept walk-in appointments if the optometrist happened

to be available at that moment. Indeed, the leases did not specify how long the optometrist must be at the office, how long the optometrist must work, or how much time he or she may spend with each patient.²

Wal-Mart's leases did not interfere in any way with the professional judgment or practice of optometry. To the contrary, the leases expressly state that optometrists should establish their hours "consistent with sound professional judgment." *See, e.g.*, D. Ex. 2 at 2.

Not surprisingly, then, Plaintiffs could not testify or offer any evidence that Wal-Mart *ever* impacted their professional medical judgment or practice in any way. Nor did they ever express any such concerns to Wal-Mart. To the contrary, every Plaintiff repeatedly testified that they had no objections to—and certainly never had any professional judgment or practice concerns with—any discussions with Wal-Mart about their hours of operation. For example:

² *See, e.g.*, R. 6356 (Dr. Boldan agreeing that "the hours the office would be open" were "not necessarily the hours [he was] there practicing optometry," and that "in fact, any hours [he] listed in the lease were hours that [he] planned to have the office open but not necessarily be there"); R. 6357 (Dr. Boldan explaining that "no matter what the hours or days listed in the lease or posted on the door [] you can be there when you like . . . because it's your business and you can run it how you like."); R. 6686 (Dr. Wiggins explaining that the hours in the lease were those he represented he "would have that office opened"); R. 7153 (testimony of Wal-Mart representative that, because the lease did not use the term "chair time," the hours listed in the lease concerned only when the office would be open—not when the doctor would be present "to see patients").

Dr. Wiggins testified that the hours he listed were “appropriate” in his “professional judgment.” R. 6684.

Dr. Boldan said the hours were “agreeable” and that the hours he listed “was never an issue.” R. 6732, 6748. *See also* R. 6344-45 (“I didn’t say the hours weren’t right.”); R. 6350 (“I never had any problems with Wal-Mart” about hours). He did not mind Wal-Mart “asking [him] when [he] would be there” or posting his hours outside of his office door. R. 6733.

Dr. Forte testified that the hours aspect “was really okay with me at the time,” R. 6432, and that no one ever required her office to be open “a certain number of hours,” R. 6472. She also acknowledged that representing her hours in the lease so that Wal-Mart could inform its customers of her hours of operation was “reasonable” and “a good reason” for the hours being in the lease. R. 6480.

And Dr. LeeSang testified that, in her “opinion as an independent professional optometrist,” the hours were “appropriate.” R. 6520; D. Exs. 17-18.

Accordingly, the district court expressly concluded that

there was no evidence that the visual welfare of the public or the Plaintiffs’ professional relationships with their patients were actually compromised by Wal-Mart’s conduct. . . . None of the Plaintiffs testified about a particular instance where the pressure to work influenced their professional medical judgment or where their listed hours caused harm to their patients or caused Plaintiffs to provide them substandard medical care. No patients came forward to testify or complain about the standard of care they received from Plaintiffs, and there was no expert testimony offered to explain how Wal-Mart’s conduct did or could potentially cause any actual harm to the public.

R. 7953-54. *See also* R. 7421 (“[T]here hasn’t been any testimony in this case that Walmart was attempting to practice optometry. Indeed, the testimony is to the contrary.”).

In sum, the record demonstrates that Wal-Mart’s leasing practices did not harm any patients or optometrists or otherwise affect their professional judgment or practice.

III. Plaintiffs Filed A Class Action Seeking Hundreds Of Millions Of Dollars In Civil Penalties Against Wal-Mart, For Doing Nothing More Than Engaging In Common Commercial Leasing Practices.

Dr. Forte filed a putative class action against Wal-Mart on April 3, 2007, alleging violations of the Texas Optometry Act based on Wal-Mart’s leasing practices. R. 52. She sought civil penalties of up to \$1,000 per day for every single day of every Wal-Mart lease of every Texas optometrist since 2003, plus attorneys’ fees, costs, and other forms of relief. R. 53-54. The district court consolidated her putative class action with another action filed by Drs. LeeSang and Wiggins, along with seven other plaintiffs. R. 1120. Dr. Boldan later joined the suit as a plaintiff. R. 1774.

Plaintiffs moved to certify a class of “approximately four hundred optometrists.” R. 2290. Following a certification hearing, the district court ordered Plaintiffs instead to select three plaintiffs to be tried as a test case. R. 4611. Plaintiffs designated Drs. Boldan, LeeSang, and Wiggins, R. 4612, and

the district court added Dr. Forte, R. 5881. The district court then denied the motion for class certification. R. 5345.

After a four-day trial, the jury awarded Plaintiffs an aggregate civil penalty of \$3,953,000—or \$1,000 for every single day of their leases with Wal-Mart. R. 6311-13. The district court noted that this was “more money than these persons would have earned in their best possible days and they earned money during this time.” R. 7593. The court added: “That’s a stunning verdict. That’s the highest verdict that’s been reached in this court . . . that I can remember, in a case that is not worthy of the highest verdict that’s been reached.” *Id.*

Wal-Mart filed a renewed motion for judgment as a matter of law. R. 7597. The court denied the motion. R. 7949. Instead, the court granted a new trial on civil penalties “unless Plaintiffs consent to a reduction of their penalty awards to \$400.00 for each day of a violation,” for a total of \$1,396,400. R. 7974. Plaintiffs consented, R. 7978, and the district court entered final judgment, R. 9096.

On appeal, Wal-Mart contested Plaintiffs’ liability theory as well as the award of civil penalties. A panel of the Fifth Circuit found liability, but then ruled that any award of civil penalties was barred by Chapter 41 of the Texas Civil Practices & Remedies Code, because Plaintiffs had not received any compensatory damages. On panel rehearing, the Fifth Circuit certified two questions to this Court concerning Chapter 41.

SUMMARY OF ARGUMENT

The Fifth Circuit certified two questions to this Court: Are civil penalties under the Texas Optometry Act (1) “damages” under Chapter 41, and (2) “exemplary damages” under Chapter 41? The answer to both questions is yes.

First, civil penalties are “damages.” Black’s Law Dictionary has explicitly defined civil penalties as a “form” of “money damages.” And countless courts across the country have said the same.

Second, civil penalties are “exemplary damages.” Indeed, Chapter 41 expressly defines “exemplary damages” as “any damages awarded as a penalty or by way of punishment but not for compensatory purposes.” And that is precisely what the civil penalties awarded in this case do—they penalize rather than compensate for actual harms.

In response, Plaintiffs now contend that denying civil penalties to private plaintiffs under Chapter 41 would automatically lead to denying civil penalties to governmental entities as well. Not so. Actions by governmental entities raise fundamentally different legal questions than actions filed by private parties—including under Chapter 41. Governmental entities enjoy a number of legal defenses that private parties do not possess.

ARGUMENT

The Fifth Circuit certified two questions to this Court: whether civil penalties under the Texas Optometry Act are “damages” under Chapter 41, and whether those civil penalties are “exemplary damages” under Chapter 41.³

I. Chapter 41 Bars The Award Of Civil Penalties In This Case.

Chapter 41 of the Texas Civil Practices and Remedies Code codifies a simple principle: “exemplary damages may be awarded only if damages other than nominal damages are awarded.” TEX. CIV. PRAC. & REM. CODE § 41.004(a). As

³ The Fifth Circuit did not certify the threshold liability question in this case—namely, whether Wal-Mart violated the Texas Optometry Act in the first place. *But see* TEX. R. APP. P. 58.1 (authorizing Texas Supreme Court to answer “determinative” certified questions of Texas law); Letter Brief of Texas Attorney General, *Severance v. Patterson*, No. 09-0387 (Tex. Oct. 10, 2011) (this Court may “reconsider the Fifth Circuit’s conclusion” on another question of Texas law and “return the certified questions unanswered,” if doing so would render the certified questions no longer “determinative” under TEX. R. APP. P. 58.1); *Severance v. Patterson*, 370 S.W.3d 705, 755-56 (Tex. 2012) (Lehrmann, J., dissenting) (“The Fifth Circuit’s short memorandum order . . . is founded on a misreading of [another Texas law],” so the Texas Supreme Court has “discretion” under TEX. R. APP. P. 58.1 to decide that issue for itself, rather than “decide[] a question of law that is determinative of no live controversy”).

Nevertheless, Wal-Mart respectfully submits that it did not violate the Act, and that this Court would agree with Wal-Mart’s interpretation of the Act. *See, e.g.* Brief of Appellant, *Forte v. Wal-Mart Stores, Inc.*, 2013 WL 431485, at *20-37 (5th Cir. Jan. 28, 2013) (interpreting Texas Optometry Act based on plain text, statutory context, statutory purpose, rule of lenity, and canon against absurdity); Reply Brief of Appellant, *Forte v. Wal-Mart Stores, Inc.*, 2013 WL 4050897, at *3-16 (5th Cir. Aug. 2, 2013) (same). At a minimum, then, the fact that there should be no liability in this case further dramatizes the importance of resolving the certified questions correctly. The Texas Legislature could not have intended that a company engaging in a commercially reasonable leasing practice—one that harms neither patients nor optometrists—may nonetheless be held liable to private litigants for millions of dollars in civil penalties.

the panel correctly held in its original opinion, Chapter 41 easily disposes of this case. Plaintiffs were not awarded any compensatory damages. So they are not entitled to civil penalties.

A. Civil Penalties Under The Texas Optometry Act Are Damages.

The first certified question asks whether civil penalties awarded under the Texas Optometry Act are “damages” under TEX. CIV. PRAC. & REM. CODE § 41.002(a). Plaintiffs have argued that “an action seeking civil penalties is not an action seeking damages.” Pet. for Reh’g En Banc at 6. But in fact, civil penalties such as the ones awarded here are a type of damages.

1. Black’s Law Dictionary has defined “civil penalties” as a “form” of “money damages.” Moreover, it has specifically directed the reader to look at “Damages (*exemplary or punitive damages*)” to complete its definition of “civil penalties.” To quote the Black’s Law definition of “civil penalties” in its entirety:

Civil penalties. Represents punishment for specific activities; *e.g.* violation of antitrust or securities laws, usually in the form of fines or money damages. *See Damages (exemplary or punitive damages)*; Penal action; Statutory penalty; Treble damages.

BLACK’S LAW DICTIONARY 246 (6th ed. 1990) (attached as App. A). (The Legislature enacted the Chapter 41 exemplary damage provision into law in 1987.)

Likewise, numerous courts across the country have characterized “civil penalties” as a type of “damages”—reflecting precisely the same common usage identified by Black’s Law Dictionary. Indeed, there are countless examples of this

common usage. *See, e.g., United States v. Ford Motor Co.*, 497 F.3d 1331, 1338 (Fed. Cir. 2007) (“civil penalties” are a “type[] of money damages”); *United States v. TDC Mgmt. Corp.*, 288 F.3d 421, 427 (D.C. Cir. 2002) (“recovered as damages a civil penalty”); *United States v. Cornerstone Wealth Corp.*, 2007 U.S. Dist. LEXIS 60185, at *27 (N.D. Tex. Aug. 16, 2007) (“civil penalties and other damages”); *Quality Infusion Care, Inc. v. Aetna Health Inc.*, 2006 U.S. Dist. LEXIS 93020, at *18 (S.D. Tex. Dec. 26, 2006) (describing “damages sought under the civil penalties portion of” an Arkansas statute); *Luken v. Ind. Ins. Co.*, 2013 U.S. Dist. LEXIS 179661, at *1-2 (S.D. Ill. Dec. 23, 2013) (including “civil penalties” as one of “various forms of money damages”); *Jefferson v. Quicken Loans, Inc.*, 2013 U.S. Dist. LEXIS 102038, at *4 (N.D. W. Va. July 19, 2013) (describing “civil penalties” as one of the “types of damages”); *Roberts v. Wyndham Int’l, Inc.*, 2012 U.S. Dist. LEXIS 170719, at *8 (N.D. Cal. Nov. 29, 2012) (“Plaintiffs claim as damages the civil penalties . . .”); *Rogers v. Apt. Mgmt. Consultants, LLC*, 2011 U.S. Dist. LEXIS 107309, at *5 (S.D. Cal. Sept. 20, 2011) (describing “civil penalties” as one of the “types of money damages”); *SEC v. Autocorp Equities, Inc.*, 292 F. Supp. 2d 1310, 1316 (D. Utah 2003) (lawsuit seeking “monetary damages in the form of civil penalties”); *Gigliotti v. Sprint Spectrum, L.P.*, 2001 U.S. Dist. LEXIS 20221, at *20 (N.D.N.Y. Dec. 7, 2001) (discussing “damages, in the form of a civil penalty”); *Breedlove v. Earthgrains Baking Cos.*, 963 F. Supp.

802, 803 (E.D. Ark. 1997) (describing “civil penalty” as “damages”); *Pub. Interest Research Grp., Inc. v. Elf Atochem N. Am., Inc.*, 817 F. Supp. 1164, 1171 (D.N.J. 1993) (describing “civil penalties” as “damages”).

2. We have found no cases specifically addressing whether civil penalties are damages, for purposes of either the Texas Optometry Act or Chapter 41 of the Texas Civil Practices and Remedies Code.

The Corpus Christi Court of Appeals recently opined that civil penalties are not damages, for purposes of the Texas Medical Liability Act (“TMLA”). It adopted this analysis in order to justify its holding that the State of Texas is not a “claimant” under the TMLA. *See State v. Emeritus Corp.*, 2015 WL 1456436, at *11 (Tex. App.—Corpus Christi Mar. 26, 2015, pet. filed) (holding that the State is not a “claimant” under the TMLA, based on the rationale that claimants are persons who seek “damages,” whereas the State was seeking only “civil penalties” in that case).

But this reasoning of Corpus Christi Court of Appeals is incorrect. As explained, civil penalties are “damages.” Black’s Law Dictionary says so. And countless courts across the country have said so. The Corpus Christi Court of Appeals failed to confront any of this authority. What’s more, that court’s reasoning to the contrary makes no sense. As that court theorized:

According to Black’s Law Dictionary, the term “damages” means money claimed by, or ordered to be paid to, a person as compensation

for loss or injury. Black’s Law Dictionary 355 (9th Ed. 2010). In contrast, a “penalty” is a punishment imposed on a wrongdoer, usually in the form of imprisonment or a fine, and a “civil penalty” is a fine assessed for a violation of a statute or regulation. *Id.* at 981.

Id. at *9. In essence, the Corpus Christi Court of Appeals said that “damages” only compensate—and “civil penalties” only penalize.

But that cannot possibly be right. Punitive damages do not compensate. Exemplary damages do not compensate. Yet both are obviously “damages.” Indeed, Chapter 41 itself makes clear that exemplary damages are a type of “damages” that do not compensate. *See* TEX. CIV. PRAC. & REM. CODE § 41.001(5) (“Exemplary damages’ means any *damages* awarded as a penalty or by way of punishment *but not for compensatory purposes.*”) (emphasis added). Under the Corpus Christi court’s reasoning, however, the *only* kind of monetary award that can be characterized as “damages” are “compensatory damages.” That is absurd.⁴

⁴ Although the Corpus Christi court’s reasoning is plainly wrong, Wal-Mart has no quarrel with the ultimate result in *Emeritus*—namely, that the State of Texas is not a “claimant” under the TMLA. Indeed, the Austin Court of Appeals reached that same result just one week after *Emeritus*—and it did so without relying on any of the flawed reasoning used in *Emeritus*. The Austin court reasoned that the State is not a “claimant” under the TMLA, because claimants must be “persons,” and the State is not a “person” under the TMLA. *See Malouf v. State ex rel. Ellis*, 2015 WL 1546084, at *3-4 (Tex. App—Austin Apr. 2, 2015, pet. filed); *see also* Brief of the State of Texas, *Malouf v. State ex rel. Ellis*, 2014 WL 1676283 (Tex. App—Austin Apr. 17, 2014). The Corpus Christi court should have reached its result by relying on the reasoning employed by the Austin court, and not by mangling the definition of “damages.”

B. Civil Penalties Under The Texas Optometry Act Are Exemplary Damages.

The Fifth Circuit has also asked whether the civil penalties awarded in this case are “exemplary damages” under TEX. CIV. PRAC. & REM. CODE § 41.004(a).

1. The plain text of Chapter 41 makes this an easy question. Chapter 41 expressly defines “exemplary damages” broadly to include “any damages awarded as a *penalty* or by way of *punishment* but *not for compensatory purposes*.” TEX. CIV. PRAC. & REM. CODE § 41.001(5) (emphasis added). The civil penalties awarded in this case easily fall within that broad definition.

Plaintiffs do not, and cannot, dispute that the civil penalties in this case were indeed awarded to “penal[ize]” or “punish[.]” Wal-Mart for its alleged conduct—and “not for compensatory purposes.” *Id.* Plaintiffs did not request compensatory damages. And they appear to concede that the civil penalties awarded here were designed to penalize Wal-Mart. *See* Pet. for Reh’g En Banc at 15 (“civil penalty claims do not focus on losses suffered by the plaintiff, but ill-gotten gains taken by the defendant”). Thus, the civil penalties awarded in this case are exemplary damages under Chapter 41.

2. Plaintiffs argued before the Fifth Circuit that “exemplary damages” includes only punitive damages—and not civil penalties. *See* Pls.’ Br. at 42. But if the Legislature had intended for Chapter 41 to cover only punitive damages, it could have said so. Instead, it chose the more expansive term “exemplary

damages”—and then put forth a three-sentence definition of the term. *See* TEX. CIV. PRAC. & REM. CODE § 41.001(5).

Surely the Legislature would not have taken the time and space to craft such an elaborate definition, if it had intended to cover only punitive damages. It could have said that “exemplary damages” means “punitive damages.” Or it could have just used the phrase “punitive damages.” But instead, the Legislature enacted a three-sentence definition of “exemplary damages” that ends with the following statement: “Exemplary damages *includes* punitive damages.” *Id.* (emphasis added). This plainly means that exemplary damages includes—but is not limited to—punitive damages. *See* TEX. GOV’T CODE § 311.005(13) (“‘Includes’ and ‘including’ are terms of enlargement and not of limitation or exclusive enumeration, and use of the terms does not create a presumption that components not expressed are excluded.”).

* * *

The panel’s original opinion was correct. Plaintiffs cannot recover civil penalties in this case, because they sustained no actual damages.

II. This Case Has Nothing To Do With Whether Chapter 41 Applies To Governmental Entities.

On rehearing before the Fifth Circuit, Plaintiffs argued that governmental entities are no different from private litigants—and that therefore, under the

original panel opinion, governmental entities would automatically be barred from recovering civil penalties in some future suit as well (absent actual damages).

But this case involves only private parties, not governmental entities. And the only question under Chapter 41 presented in this case is whether civil penalties are “exemplary damages.” This case does *not* present the entirely distinct question of whether Chapter 41 applies to governmental entities in the first place.

And make no mistake: Answering the first question does not in any way answer the second. Denying civil penalties to private plaintiffs under Chapter 41 would not automatically lead to denying civil penalties to governmental entities. After all, in a future suit, Texas governmental entities will be able to invoke any number of legal defenses that private parties cannot. To take just a few examples:

1. Courts have long recognized that “the general words of a statute do not include the government or affect its rights unless the construction be clear and indisputable upon the text of the act.” *Nardone v. United States*, 302 U.S. 379, 383 (1937). That canon has special force where “an act, if not so limited, would deprive the sovereign of a recognized or established prerogative title or interest,”

id.—such as the public interest in enforcing the law and imposing civil penalties on violators that the government deems worthy of pursuing on behalf of the public.⁵

2. Chapter 41 does not satisfy this standard. Nothing in the text of Chapter 41 indicates that the Legislature intended to apply it to Texas governmental entities. If anything, statutory text arguably reflects precisely the opposite legislative intention.

The Texas Legislature enacted Chapter 41, not as a stand-alone bill, but as part of an omnibus series of revisions to the Texas Civil Practice and Remedies Code. *See* Tex. S.B. 5, § 2.12 (1987) (attached as App. B). One of the other chapters enacted in that very same bill, for example, was Chapter 9. *See id.* § 2.01.

⁵ *See also Dollar Sav. Bank v. United States*, 86 U.S. 227, 239 (1873) (“It is a familiar principle that the King is not bound by any act of Parliament unless he be named therein by special and particular words. The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him in the least, if they may tend to restrain or diminish any of his rights and interests.”); *United States v. Hoar*, 26 F. Cas. 329, 330 (C.C.D. Mass. 1821) (Story, J.) (“It appears to me, therefore, to be a safe rule founded in the principles of the common law, that the general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act.”); *United States v. Singleton*, 165 F.3d 1297, 1300 (10th Cir. 1999) (“Statutes of general purport do not apply to the United States unless Congress makes the application clear and indisputable.”) (citing 8 Matthew Bacon, A NEW ABRIDGMENT OF THE LAW 92 (1869) (“[W]here a statute is general, and thereby (a) any prerogative, right, title, or interest is divested or taken from the king, in such case the king shall not be bound, (b) unless the statute is made by express words to extend to him.”); Henry Campbell Black, THE CONSTRUCTION AND INTERPRETATION OF THE LAWS 94-97 (2d ed. 1911) (same)).

Notably, the Legislature explicitly made Chapter 9 applicable to governmental entities. *See id.* (codifying TEX. CIV. PRAC. & REM. CODE § 9.002(b) (expressly applying Chapter 9 to “the State of Texas” as well as “a county,” “a municipality,” and “any other political subdivision of the state”)). By contrast, the Legislature included no such language in Chapter 41. *See id.* § 2.12 (codifying TEX. CIV. PRAC. & REM. CODE § 41.002 (no reference to governmental entities in applicability provision of Chapter 41)).

3. Moreover, it is easy to see why the Legislature might choose not to apply Chapter 41 to governmental entities. Chapter 41 is a tort reform statute. It was designed to target abuses by the private plaintiffs’ bar—like this case—not lawsuits filed by appointed and elected government officials, charged with acting on behalf of the public interest. *See* TEX. GOV’T CODE § 311.023 (“In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the: object sought to be attained; circumstances under which the statute was enacted; [and] legislative history”).

4. The Texas Optometry Act itself draws similar distinctions between private litigants and the government. *Compare* TEX. OCC. CODE § 351.605 (a private party cannot recover damages without “injur[y] as a result of a violation”); TEX. OCC. CODE § 351.602(c)(2) (same), *with* TEX. OCC. CODE § 351.603 (no injury requirement for actions by Attorney General). Private litigants must be

injured before they may file an action under the Texas Optometry Act. So it should be no surprise that Chapter 41 requires them to receive at least some compensatory damages for those supposed injuries, before they can receive millions of dollars in civil penalties. By contrast, the government need not be injured to sue under the Texas Optometry Act—which is why it makes sense that Chapter 41 does not bar the government from recovering civil penalties in the absence of damages.

* * *

This is a curious case. Not only do Plaintiffs oddly contend that Wal-Mart violated Texas law simply by asking optometrists what hours their office might be open—but they seek large civil penalties for that supposed offense, notwithstanding the admitted absence of even a single dollar of actual damages.

That is an extraordinary claim, and it is not surprising that the Fifth Circuit panel’s original opinion unanimously rejected it. Indeed, even Plaintiffs have since acknowledged concerns that they are seeking a “windfall.” Pet. for Reh’g En Banc at 15. The Texas Legislature enacted Chapter 41 to prevent precisely this kind of windfall. Chapter 41 makes clear that, when plaintiffs suffer no harm and recover zero dollars in compensatory damages, they are not entitled to millions of dollars in exemplary damages.

PRAYER

The Court should answer both certified questions in the affirmative. The civil penalties sought by Plaintiffs under the Texas Optometry Act are “damages” under TEX. CIV. PRAC. & REM. CODE § 41.002(a), and “exemplary damages” under TEX. CIV. PRAC. & REM. CODE § 41.004(a). Accordingly, Plaintiffs are not entitled to civil penalties, because they did not receive any actual damages.

DATED: June 5, 2015

Respectfully submitted,

Jim E. Cowles
State Bar No. 04931000
Sim Israeloff
State Bar No. 10435380
R. Michael Northrup
State Bar No. 15103250
COWLES & THOMPSON PC
901 Main Street, Suite 3900
Dallas, TX 75202-3746
Tel.: (214) 672-2000
Fax: (214) 672-2020
jcowles@cowlesthompson.com
sisraeloff@cowlesthompson.com
mnorthrup@cowlesthompson.com

/s/ James C. Ho
James C. Ho
State Bar No. 24052766
Prerak Shah
State Bar No. 24075053
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue, Suite 1100
Dallas, TX 75201-6912
Tel.: (214) 698-3264
Fax: (214) 571-2917
jho@gibsondunn.com
pshah@gibsondunn.com

COUNSEL FOR APPELLANT

CERTIFICATE OF COMPLIANCE

In compliance with Texas Rule of Appellate Procedure 9.4(i)(2), I hereby certify that this brief contains 4,441 words, excluding the portions of the brief exempted by Rule 9.4(i)(1).

/s/ James C. Ho
James C. Ho

CERTIFICATE OF SERVICE

I hereby certify that, on June 5, 2015, a true and correct copy of the foregoing Brief of Appellant was served via electronic service on all counsel of record in this case.

/s/ James C. Ho
James C. Ho

APPENDIX

App. A: BLACK'S LAW DICTIONARY (6th ed. 1990)

App. B: Tex. S.B. 5 (1987)

APP. A

BLACK'S LAW DICTIONARY®

Definitions of the Terms and Phrases of
American and English Jurisprudence,
Ancient and Modern

By

HENRY CAMPBELL BLACK, M. A.

SIXTH EDITION

BY

THE PUBLISHER'S EDITORIAL STAFF

Coauthors

JOSEPH R. NOLAN

Associate Justice, Massachusetts Supreme Judicial Court
and

JACQUELINE M. NOLAN-HALEY

Associate Clinical Professor,
Fordham University School of Law

Contributing Authors

M. J. CONNOLLY

Associate Professor (Linguistics),
College of Arts & Sciences, Boston College

STEPHEN C. HICKS

Professor of Law, Suffolk University
Law School, Boston, MA

MARTINA N. ALIBRANDI

Certified Public Accountant, Bolton, MA

ST. PAUL, MINN.
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Civilian. Private citizen, as distinguished from such as belong to the armed services, or (in England) the church. One who is skilled or versed in the civil law.

Civilis /sivələs/. Lat. Civil, as distinguished from criminal. *Civilis actio*, a civil action.

Civilista /sivəlistə/. In old English law, a civil lawyer, or civilian.

Civiliter /səvilətər/. Civilly. In a person's civil character or position, or by civil (not criminal) process or procedure. This term is used in distinction or opposition to the word "*criminaliter*,"—criminally,—to distinguish civil actions from criminal prosecutions.

Civiliter mortuus /səvilətər mórtyuwəs/. Civilly dead; dead in the view of the law. The condition of one who has lost his civil rights and capacities, and is considered civilly dead in law. *See* Civil death.

Civilization. A law, an act of justice, or judgment which renders a criminal process civil.

A term which covers several states of society; it is relative, and has no fixed sense, but implies an improved and progressive condition of the people, living under an organized government. It consists not merely in material achievements, in accomplishment and accumulation of wealth, or in advancement in culture, science, and knowledge, but also in doing of equal and exact justice.

Civil jury trial. Trial of civil action before a jury rather than before a judge. In suits at common law in Federal court where value in controversy exceeds \$20.00, there is constitutional right to jury trial. U.S.Const., 7th Amend.; Fed.R.Civil P. 38. *See also* Jury trial.

Civil law. That body of law which every particular nation, commonwealth, or city has established peculiarly for itself; more properly called "municipal" law, to distinguish it from the "law of nature," and from international law. Laws concerned with civil or private rights and remedies, as contrasted with criminal laws.

The system of jurisprudence held and administered in the Roman empire, particularly as set forth in the compilation of Justinian and his successors,—comprising the Institutes, Code, Digest, and Novels, and collectively denominated the "*Corpus Juris Civilis*,"—as distinguished from the common law of England and the canon law. The civil law (Civil Code) is followed in Louisiana. *See* Code Civil.

Civil liability. The amenability to civil action as distinguished from amenability to criminal prosecution. A sum of money assessed either as general, special or liquidated damages; may be either single, double or treble for violations such as overcharges.

Civil liability acts. *See* Dram Shop Acts.

Civil liberties. Personal, natural rights guaranteed and protected by Constitution; *e.g.* freedom of speech, press, freedom from discrimination, etc. Body of law dealing with natural liberties, shorn of excesses which invade equal rights of others. Constitutionally, they are restraints on government. *Sowers v. Ohio Civil Rights Commission*, 20 Ohio Misc. 115, 252 N.E.2d 463, 476.

State law may recognize liberty interests more extensive than those independently protected by the Federal Constitution. *Mills v. Rogers*, 457 U.S. 291, 300, 102 S.Ct. 2442, 2449, 73 L.Ed.2d 16 (1982). *See also* Bill of Rights; Civil Rights Acts; Fundamental rights.

Civil nuisance. At common law, anything done to hurt or annoyance of lands, tenements, or hereditaments of another. *See* Nuisance.

Civil obligation. One which binds in law, and may be enforced in a court of justice.

Civil offense. Term used to describe violations of statutes making the act a public nuisance. Also describes an offense which is *malum prohibitum* and not considered reprehensible.

Civil office. A non-military public office; one which pertains to the exercise of the powers or authority of government.

Civil officer. *See* Officer.

Civil penalties. Represents punishment for specific activities; *e.g.* violation of antitrust or securities laws, usually in the form of fines or money damages. *See* Damages (*exemplary or punitive damages*); Penal action; Statutory penalty; Treble damages.

Civil possession. *See* Possession.

Civil procedure. Body of law concerned with methods, procedures and practices used in civil litigation, *e.g.* Federal Rules of Civil Procedure; Title 28 of United States Code.

Civil process. *See* Process.

Civil responsibility. The liability to be called upon to respond to an action at law for an injury caused by a delict or crime, as opposed to criminal responsibility, or liability to be proceeded against in a criminal tribunal.

Civil rights. *See* Civil liberties.

Civil Rights Acts. Federal statutes enacted after Civil War, and more recently in 1957 and 1964, intended to implement and give further force to basic personal rights guaranteed by Constitution. Such Acts prohibit discrimination based on race, color, age, or religion.

Civil rules. *See* Federal Rules of Civil Procedure.

Civil servant. *See* Civil service.

Civil service. Term generally means employment in federal, state, city and town government with such positions filled on merit as a result of competitive examinations. Such employment carries with it certain statutory rights to job security, advancement, benefits, etc. *See* Civil Service Commission; Competitive civil service examination; Merit Systems Protection Board; Office of Personnel Management.

Civil Service Commission. The United States Civil Service Commission (CSC) was created by act of Congress on January 16, 1883. Authority is codified under 5 U.S.C.A. § 1101.

The Civil Service Act was designed to establish a merit system under which appointments to Federal jobs are made on the basis of fitness—as determined by open

APP. B

Enrolled June 3, 1987
Kathy Spaw
Enrolling Clerk

S.B. No. 5

1 AN ACT
2 relating to revising the Civil Practice and Remedies Code to reform
3 procedures and remedies in civil actions for personal injury,
4 property damage, or death and civil actions based on tortious
5 conduct, including revisions and additions to laws governing the
6 determination of and limitations on liability and damages.

7 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

8 ARTICLE 1. GENERAL PROVISIONS

9 SECTION 1.01. FINDINGS AND PURPOSE. (a) The 70th
10 Legislature, Regular Session, of the State of Texas makes the
11 following findings:

12 (1) The House/Senate Joint Committee on Liability Insurance
13 and Tort Law and Procedure, appointed in 1986, was charged with
14 studying the availability and cost of commercial, professional, and
15 governmental liability insurance and the impact of the tort
16 recovery process on the insurance industry. The joint committee
17 engaged in extensive fact-finding and reported its findings and
18 conclusions to the legislature.

19 (2) A serious liability insurance crisis currently exists in
20 the State of Texas and is having adverse effects on the
21 availability and affordability of various types of liability
22 insurance and the economic development and growth of this state and
23 the well-being of its citizens.

24 (3) Included among the wide variety of persons and entities
25 and activities that are being adversely affected by the liability

1 insurance crisis are:

2 (A) cities and their governmental and proprietary functions;

3 (B) counties, school districts, and other governmental
4 units, and the educational and human services they provide;

5 (C) professionals, including physicians and health care
6 providers, and the quantity, affordability, and availability of the
7 various services they provide;

8 (D) charities and other nonprofit organizations and their
9 humanitarian and benevolent services;

10 (E) day care centers and the services they provide; and

11 (F) businesses and industries, including the goods and
12 services they provide and the incentives that encourage growth and
13 expansion of existing enterprises and that attract new ventures.

14 (4) A lack of predictability in this state's justice system
15 constitutes a significant contributing cause of the current
16 liability insurance crisis.

17 (5) These public policy problems compel a legislative
18 response that includes meaningful tort reform measures that will
19 restore and maintain reasonable predictability in the civil justice
20 system of Texas.

21 (6) The provisions of this Act will accomplish needed civil
22 justice reform, while preserving the basic rights of injured
23 persons to obtain appropriate relief through civil actions under
24 the laws of this state.

25 (b) The 70th Legislature, having determined that the
26 measures embodied in this Act are necessary and appropriate in

1 order to reform the civil justice system of this state, enacts this
2 legislation for the purpose of reforming the civil justice system
3 of Texas. To this end, this Act revises appropriate procedural and
4 substantive provisions of the Civil Practice and Remedies Code
5 applicable to actions for personal injury, property damage, or
6 death and other civil actions based on tortious conduct.

7 ARTICLE 2. TRIAL; JUDGMENT

8 SECTION 2.01. Subtitle A, Title 2, Civil Practice and
9 Remedies Code, is amended by adding Chapter 9 to read as follows:

10 CHAPTER 9. FRIVOLOUS PLEADINGS AND CLAIMS

11 SUBCHAPTER A. GENERAL PROVISIONS

12 Sec. 9.001. DEFINITIONS. In this chapter:

13 (1) "Claimant" means a party, including a plaintiff,
14 counterclaimant, cross-claimant, third-party plaintiff, or
15 intervenor, seeking recovery of damages. In an action in which a
16 party seeks recovery of damages for injury to another person,
17 damage to the property of another person, death of another person,
18 or other harm to another person, "claimant" includes both that
19 other person and the party seeking recovery of damages.

20 (2) "Defendant" means a party, including a
21 counterdefendant, cross-defendant, or third-party defendant, from
22 whom a claimant seeks relief.

23 (3) "Groundless" means:

24 (A) no basis in fact; or

25 (B) not warranted by existing law or a good
26 faith argument for the extension, modification, or reversal of

1 existing law.

2 (4) "Pleading" includes a motion.

3 Sec. 9.002. APPLICABILITY. (a) This chapter applies to an
4 action in which a claimant seeks:

5 (1) damages for personal injury, property damage, or
6 death, regardless of the legal theories or statutes on the basis of
7 which recovery is sought, including an action based on intentional
8 conduct, negligence, strict tort liability, products liability
9 (whether strict or otherwise), or breach of warranty; or

10 (2) damages other than for personal injury, property
11 damage, or death resulting from any tortious conduct, regardless of
12 the legal theories or statutes on the basis of which recovery is
13 sought, including libel, slander, or tortious interference with a
14 contract or other business relation.

15 (b) This chapter applies to any party who is a claimant or
16 defendant, including but not limited to:

17 (1) a county;

18 (2) a municipality;

19 (3) a public school district;

20 (4) a public junior college district;

21 (5) a charitable organization;

22 (6) a nonprofit organization;

23 (7) a hospital district;

24 (8) a hospital authority;

25 (9) any other political subdivision of the state; and

26 (10) the State of Texas.

1 (c) In an action to which this chapter applies, the
2 provisions of this chapter prevail over all other law to the extent
3 of any conflict.

4 Sec. 9.003. TEXAS RULES OF CIVIL PROCEDURE. This chapter
5 does not alter the Texas Rules of Civil Procedure or the Texas
6 Rules of Appellate Procedure.

7 Sec. 9.004. APPLICABILITY. This chapter does not apply to
8 the Deceptive Trade Practices-Consumer Protection Act (Subchapter
9 E, Chapter 17, Business & Commerce Code) or to Chapter 21,
10 Insurance Code.

11 [Sections 9.005-9.010 reserved for expansion]

12 SUBCHAPTER B. SIGNING OF PLEADINGS

13 Sec. 9.011. SIGNING OF PLEADINGS. The signing of a pleading
14 as required by the Texas Rules of Civil Procedure constitutes a
15 certificate by the signatory that to the signatory's best
16 knowledge, information, and belief, formed after reasonable
17 inquiry, the pleading is not:

18 (1) groundless and brought in bad faith;

19 (2) groundless and brought for the purpose of
20 harassment; or

21 (3) groundless and interposed for any improper
22 purpose, such as to cause unnecessary delay or needless increase in
23 the cost of litigation.

24 Sec. 9.012. VIOLATION; SANCTION. (a) At the trial of the
25 action or at any hearing inquiring into the facts and law of the
26 action, after reasonable notice to the parties, the court may on

S.B. No. 5

1 its own motion, or shall on the motion of any party to the action,
2 determine if a pleading has been signed in violation of any one of
3 the standards prescribed by Section 9.011.

4 (b) In making its determination of whether a pleading has
5 been signed in violation of any one of the standards prescribed by
6 Section 9.011, the court shall take into account:

- 7 (1) the multiplicity of parties;
- 8 (2) the complexity of the claims and defenses;
- 9 (3) the length of time available to the party to
10 investigate and conduct discovery; and
- 11 (4) affidavits, depositions, and any other relevant
12 matter.

13 (c) If the court determines that a pleading has been signed
14 in violation of any one of the standards prescribed by Section
15 9.011, the court shall, not earlier than 90 days after the date of
16 the determination, at the trial or hearing or at a separate hearing
17 following reasonable notice to the offending party, impose an
18 appropriate sanction on the signatory, a represented party, or
19 both.

20 (d) The court may not order an offending party to pay the
21 incurred expenses of a party who stands in opposition to the
22 offending pleading if, before the 90th day after the court makes a
23 determination under Subsection (a), the offending party withdraws
24 the pleading or amends the pleading to the satisfaction of the
25 court or moves for dismissal of the pleading or the offending
26 portion of the pleading.

1 (e) The sanction may include one or more of the following:

2 (1) the striking of a pleading or the offending
3 portion thereof;

4 (2) the dismissal of a party; or

5 (3) an order to pay to a party who stands in
6 opposition to the offending pleading the amount of the reasonable
7 expenses incurred because of the filing of the pleading, including
8 costs, reasonable attorney's fees, witness fees, fees of experts,
9 and deposition expenses.

10 (f) The court may not order an offending party to pay the
11 incurred expenses of a party who stands in opposition to the
12 offending pleading if the court has, with respect to the same
13 subject matter, imposed sanctions on the party who stands in
14 opposition to the offending pleading under the Texas Rules of Civil
15 Procedure.

16 (g) All determinations and orders pursuant to this chapter
17 are solely for purposes of this chapter and shall not be the basis
18 of any liability, sanction, or grievance other than as expressly
19 provided in this chapter.

20 Sec. 9.013. REPORT TO GRIEVANCE COMMITTEE. (a) If the
21 court imposes a sanction against an offending party under Section
22 9.012, the offending party is represented by an attorney who signed
23 the pleading in violation of any one of the standards under Section
24 9.011, and the court finds that the attorney has consistently
25 engaged in activity that results in sanctions under Section 9.012,
26 the court shall report its finding to an appropriate grievance

1 committee as provided by the State Bar Act (Article 320a-1,
2 Vernon's Texas Civil Statutes) or by a similar law in the
3 jurisdiction in which the attorney resides.

4 (b) The report must contain:

5 (1) the name of the attorney who represented the
6 offending party;

7 (2) the finding by the court that the pleading was
8 signed in violation of any one of the standards under Section
9 9.011;

10 (3) a description of the sanctions imposed against the
11 signatory and the offending party; and

12 (4) the finding that the attorney has consistently
13 engaged in activity that results in sanctions under Section 9.012.

14 Sec. 9.014. PLEADINGS NOT FRIVOLOUS. (a) A general denial
15 does not constitute a violation of any of the standards prescribed
16 by Section 9.011.

17 (b) The amount requested for damages in a pleading does not
18 constitute a violation of any of the standards prescribed by
19 Section 9.011.

20 SECTION 2.02. The heading of Chapter 33, Civil Practice and
21 Remedies Code, is amended to read as follows:

22 CHAPTER 33. COMPARATIVE RESPONSIBILITY [~~NEGLIGENCE~~]

23 SECTION 2.03. The heading of Subchapter A, Chapter 33, Civil
24 Practice and Remedies Code, is amended to read as follows:

25 SUBCHAPTER A. COMPARATIVE RESPONSIBILITY [~~NEGLIGENCE~~]

26 SECTION 2.04. Section 33.001, Civil Practice and Remedies

1 Code, is amended to read as follows:

2 Sec. 33.001. COMPARATIVE RESPONSIBILITY [NEGLIGENCE]. (a)
3 In an action to recover damages for negligence resulting in
4 personal injury, property damage, or death or an action for
5 products liability grounded in negligence, a claimant may recover
6 damages only if his percentage of responsibility is less than or
7 equal to 50 percent.

8 (b) In an action to recover damages for personal injury,
9 property damage, or death in which at least one defendant is found
10 liable on a basis of strict tort liability, strict products
11 liability, or breach of warranty under Chapter 2, Business &
12 Commerce Code, a claimant may recover damages only if his
13 percentage of responsibility is less than 60 percent.

14 (c) In an action in which a claimant seeks damages for harm
15 other than personal injury, property damage, or death, arising out
16 of any action grounded in negligence, including but not limited to
17 negligence relating to any professional services rendered by an
18 architect, attorney, certified public accountant, real estate
19 broker or agent, or engineer licensed by this state, a claimant may
20 recover damages only if his percentage of responsibility is less
21 than or equal to 50 percent. [~~In an action to recover damages for~~
22 negligence resulting in death or injury to a person or property,
23 contributory negligence does not bar recovery if the contributory
24 negligence is not greater than the negligence of the person or
25 persons against whom recovery is sought.

26 [~~(b) Damages allowed are diminished in proportion to the~~

~~amount-of-negligence-attributed-to-the-person-recovering.]~~

SECTION 2.05. Chapter 33, Civil Practice and Remedies Code, is amended by adding Section 33.002 to read as follows:

Sec. 33.002. APPLICABILITY. (a) This chapter does not apply to a claim based on an intentional tort or a claim for exemplary damages included in an action to which this chapter otherwise applies.

(b) This chapter does not apply to:

(1) an action to collect workers' compensation benefits under the workers' compensation laws of this state (Article 8306 et seq., Vernon's Texas Civil Statutes) or actions against an employer for exemplary damages arising out of the death of an employee;

(2) an action brought under the Deceptive Trade Practices-Consumer Protection Act (Subchapter E, Chapter 17, Business & Commerce Code); or

(3) an action brought under Chapter 21, Insurance Code.

SECTION 2.06. Chapter 33, Civil Practice and Remedies Code, is amended by adding Section 33.003 to read as follows:

Sec. 33.003. DETERMINATION OF COMPARATIVE RESPONSIBILITY. The trier of fact, as to each cause of action asserted, shall determine the percentage of responsibility with respect to:

- (1) each claimant;
- (2) each defendant; and
- (3) each settling person.

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1 SECTION 2.07. Section 33.011, Civil Practice and Remedies
2 Code, is amended to read as follows:

3 Sec. 33.011. DEFINITIONS. In this chapter [~~subchapter~~]:

4 (1) "Claimant" means a party seeking recovery of
5 damages pursuant to the provisions of Section 33.001 [~~relief~~],
6 including a plaintiff, counterclaimant, [~~or~~] cross-claimant, or
7 third-party plaintiff seeking recovery of damages. In an action in
8 which a party seeks recovery of damages for injury to another
9 person, damage to the property of another person, death of another
10 person, or other harm to another person, "claimant" includes both
11 that other person and the party seeking recovery of damages
12 pursuant to the provisions of Section 33.001.

13 (2) "Defendant" includes any party from whom a
14 claimant seeks recovery of damages pursuant to the provisions of
15 Section 33.001 at the time of the submission of the case to the
16 trier of fact [~~relief~~].

17 (3) "Liabe defendant" means a defendant against whom
18 a judgment can be entered for at least a portion of the damages
19 awarded to the claimant.

20 (4) "Percentage of responsibility" means that
21 percentage attributed by the trier of fact to each claimant, each
22 defendant, or each settling person with respect to causing or
23 contributing to cause in any way, whether by negligent act or
24 omission, by any defective or unreasonably dangerous product, by
25 other conduct or activity violative of the applicable legal
26 standard, or by any combination of the foregoing, the personal
27 injury, property damage, death, or other harm for which recovery of

1 damages is sought.

2 (5) "Settling person" means a person who at the time
3 of submission has paid or promised to pay money or anything of
4 monetary value to a claimant at any time in consideration of
5 potential liability pursuant to the provisions of Section 33.001
6 with respect to the personal injury, property damage, death, or
7 other harm for which recovery of damages is sought.

8 SECTION 2.08. Section 33.012, Civil Practice and Remedies
9 Code, is amended to read as follows:

10 Sec. 33.012. AMOUNT OF RECOVERY. (a) If the claimant is
11 not barred from recovery under Section 33.001, the court shall
12 reduce the amount of damages to be recovered by the claimant with
13 respect to a cause of action by a percentage equal to the
14 claimant's percentage of responsibility.

15 (b) If the claimant has settled with one or more persons,
16 the court shall further reduce the amount of damages to be
17 recovered by the claimant with respect to a cause of action by a
18 credit equal to one of the following, as elected in accordance with
19 Section 33.014:

20 (1) the sum of the dollar amounts of all settlements;

21 or

22 (2) a dollar amount equal to the sum of the following
23 percentages of damages found by the trier of fact:

24 (A) 5 percent of those damages up to \$200,000;

25 (B) 10 percent of those damages from \$200,001 to
26 \$400,000;

27 (C) 15 percent of those damages from \$400,001 to

1 \$500,000; and

2 (D) 20 percent of those damages greater than
3 \$500,000.

4 (c) The amount of damages recoverable by the claimant may
5 only be reduced once by the credit provided for in Subsection (b).

6 [Sec. 33.012--DAMAGES-IN-PROPORTION--If there is more than
7 one defendant and the claimant's negligence does not exceed the
8 total negligence of all defendants, contribution must be in
9 proportion to the percentage of negligence attributable to each
10 defendant.]

11 SECTION 2.09. Section 33.013, Civil Practice and Remedies
12 Code, is amended to read as follows:

13 Sec. 33.013. AMOUNT OF LIABILITY. (a) Except as provided
14 in Subsections (b) and (c), a liable defendant is liable to a
15 claimant only for the percentage of the damages found by the trier
16 of fact equal to that defendant's percentage of responsibility with
17 respect to the personal injury, property damage, death, or other
18 harm for which the damages are allowed.

19 (b) Notwithstanding Subsection (a), each liable defendant
20 is, in addition to his liability under Subsection (a), jointly and
21 severally liable for the damages recoverable by the claimant under
22 Section 33.012 with respect to a cause of action if:

23 (1) the percentage of responsibility attributed to the
24 defendant is greater than 20 percent; and

25 (2) only for a negligence action pursuant to Section
26 33.001(a) or (c), the percentage of responsibility attributed to

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1 the defendant is greater than the percentage of responsibility
2 attributed to the claimant.

3 (c) Notwithstanding Subsection (a), each liable defendant
4 is, in addition to his liability under Subsection (a), jointly and
5 severally liable for the damages recoverable by the claimant under
6 Section 33.012 with respect to a cause of action if:

7 (1) no percentage of responsibility is attributed to
8 the claimant and the percentage of responsibility attributed to the
9 defendant is greater than 10 percent; or

10 (2) the claimant's personal injury, property damage,
11 or death is caused by the depositing, discharge, or release into
12 the environment of any hazardous or harmful substance as described
13 in Subdivision (3); or

14 (3) the claimant's personal injury, property damage,
15 or death resulted from a "toxic tort." "Toxic tort" means a cause
16 of action in tort or for breach of implied warranty under Chapter
17 2, Business & Commerce Code, arising out of exposure to hazardous
18 chemicals, hazardous wastes, hazardous hydrocarbons, similarly
19 harmful organic or mineral substances, hazardous radiation sources,
20 and other similarly harmful substances (which usually, but need not
21 necessarily, arise in the work place), but not including any "drug"
22 as defined in Section 81.001(3), Civil Practice and Remedies Code.

23 (d) This section does not create a cause of action.

24 ~~[See--33.013--DEFENDANT-JOINTLY-AND-SEVERALLY-LIABLE---Each~~
25 ~~defendant--is-jointly-and-severally-liable-for-the-entire-amount-of~~
26 ~~the-judgment-awarded-the-claimant,--except-that--a--defendant--whose~~

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1 negligence--is--less--than--that--of--the-claimant-is-liable-to-the
2 claimant-only-for-that-portion-of-the-judgment-that-represents--the
3 percentage-of-negligence-attributable-to-him-]

4 SECTION 2.10. Section 33.014, Civil Practice and Remedies
5 Code, is amended to read as follows:

6 Sec. 33.014. ELECTION OF CREDIT FOR SETTLEMENTS. (a) If a
7 claimant has settled with one or more persons, an election must be
8 made as to which dollar credit is to be applied under Section
9 33.012(b). This election shall be made by any defendant filing a
10 written election before the issues of the action are submitted to
11 the trier of fact and, when made, shall be binding on all
12 defendants. If no defendant makes this election or if conflicting
13 elections are made, all defendants are considered to have elected
14 Subdivision (2) of Section 33.012(b).

15 [~~Sec. 33.014. SETTLEMENT. TORT-FEASOR--NOT-PARTY-DEFENDANT.~~
16 ~~If the existence and amount of an alleged joint tort-feasor's~~
17 ~~negligence are not submitted to the jury because the tort-feasor~~
18 ~~has paid an amount in settlement to a claimant and was not joined~~
19 ~~as a party defendant or having been joined, was dismissed or~~
20 ~~nonsuited after settling, each defendant is entitled to deduct from~~
21 ~~the amount for which he is liable to the claimant a percentage of~~
22 ~~the amount of the settlement based on the ratio of the defendant's~~
23 ~~negligence to the total negligence of all defendants.]~~

24 SECTION 2.11. Section 33.015, Civil Practice and Remedies
25 Code, is amended to read as follows:

26 Sec. 33.015. CONTRIBUTION. (a) If a defendant who is

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1 jointly and severally liable under Section 33.013 pays a percentage
2 of the damages for which the defendant is jointly and severally
3 liable greater than his percentage of responsibility, that
4 defendant has a right of contribution for the overpayment against
5 each other liable defendant to the extent that the other liable
6 defendant has not paid the percentage of the damages found by the
7 trier of fact equal to that other defendant's percentage of
8 responsibility.

9 (b) As among themselves, each of the defendants who is
10 jointly and severally liable under Section 33.013 is liable for the
11 damages recoverable by the claimant under Section 33.012 in
12 proportion to his respective percentage of responsibility. If a
13 defendant who is jointly and severally liable pays a larger
14 proportion of those damages than is required by his percentage of
15 responsibility, that defendant has a right of contribution for the
16 overpayment against each other defendant with whom he is jointly
17 and severally liable under Section 33.013 to the extent that the
18 other defendant has not paid the proportion of those damages
19 required by that other defendant's percentage of responsibility.

20 (c) If for any reason a liable defendant does not pay or
21 contribute the portion of the damages required by his percentage of
22 responsibility, the amount of the damages not paid or contributed
23 by that defendant shall be paid or contributed by the remaining
24 defendants who are jointly and severally liable for those damages.
25 The additional amount to be paid or contributed by each of the
26 defendants who is jointly and severally liable for those damages

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1 shall be in proportion to his respective percentage of
2 responsibility.

3 (d) No defendant has a right of contribution against any
4 settling person.

5 [~~See 33.015. SETTLEMENT. TORT-FEASOR-PARTY-DEFENDANT. If~~
6 ~~an alleged joint tort-feasor settles with a claimant but is joined~~
7 ~~as a party defendant when the case is submitted to the jury so that~~
8 ~~the existence and amount of his negligence are submitted to the~~
9 ~~jury and his percentage of negligence is found by the jury, the~~
10 ~~settlement is a complete release of the portion of the judgment~~
11 ~~attributable to him.]~~

12 SECTION 2.11A. Section 33.016, Civil Practice and Remedies
13 Code, is amended to read as follows:

14 Sec. 33.016. CLAIM AGAINST CONTRIBUTION DEFENDANT [CREDIT
15 TOWARD LIABILITY]. (a) In this section, "contribution defendant"
16 means any defendant, counterdefendant, or third-party defendant
17 from whom any party seeks contribution with respect to any portion
18 of damages for which that party may be liable, but from whom the
19 claimant seeks no relief at the time of submission.

20 (b) Each liable defendant is entitled to contribution from
21 each person who is not a settling person and who is liable to the
22 claimant for a percentage of responsibility but from whom the
23 claimant seeks no relief at the time of submission. A party may
24 assert this contribution right against any such person as a
25 contribution defendant in the claimant's action.

26 (c) The trier of fact shall determine as a separate issue or

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1 finding of fact the percentage of responsibility with respect to
2 each contribution defendant and these findings shall be solely for
3 purposes of this section and Section 33.015 and not as a part of
4 the percentages of responsibility determined under Section 33.003.
5 Only the percentage of responsibility of each defendant and
6 contribution defendant shall be included in this determination.

7 (d) As among liable defendants, including each defendant who
8 is jointly and severally liable under Section 33.013, each
9 contribution defendant's percentage of responsibility is to be
10 included for all purposes of Section 33.015. The amount to be
11 contributed by each contribution defendant pursuant to Section
12 33.015 shall be in proportion to his respective percentage of
13 responsibility relative to the sum of percentages of responsibility
14 of all liable defendants and liable contribution defendants. [~~if,~~
15 ~~because--of--the--application--of--the--rules--of--this--subchapter--two~~
16 ~~claimants--are--liable--to--each--other--in--damages--the--claimant--who--is~~
17 ~~liable--for--the--greater--amount--is--entitled--to--a--credit--toward--his~~
18 ~~liability--in--the--amount--of--damages--owed--him--by--the--other--claimant--].~~

19 SECTION 2.11B. Section 33.017, Civil Practice and Remedies
20 Code, is repealed.

21 SECTION 2.12. Subtitle C, Title 2, Civil Practice and
22 Remedies Code, is amended by adding Chapter 41 to read as follows:

23 CHAPTER 41. EXEMPLARY DAMAGES

24 Sec. 41.001. DEFINITIONS. In this chapter:

25 (1) "Claimant" means a party, including a plaintiff,
26 counterclaimant, cross-claimant, or third-party plaintiff, seeking

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1 recovery of exemplary damages. In a cause of action in which a
2 party seeks recovery of exemplary damages related to injury to
3 another person, damage to the property of another person, death of
4 another person, or other harm to another person, "claimant"
5 includes both that other person and the party seeking recovery of
6 exemplary damages.

7 (2) "Defendant" means a party, including a
8 counterdefendant, cross-defendant, or third-party defendant, from
9 whom a claimant seeks relief with respect to exemplary damages.

10 (3) "Exemplary damages" means any damages awarded as
11 an example to others, as a penalty, or by way of punishment.
12 "Exemplary damages" includes punitive damages.

13 (4) "Fraud" means fraud other than constructive fraud.

14 (5) "Gross negligence" means more than momentary
15 thoughtlessness, inadvertence, or error of judgment. It means such
16 an entire want of care as to establish that the act or omission was
17 the result of actual conscious indifference to the rights, safety,
18 or welfare of the person affected.

19 (6) "Malice" means:

20 (A) conduct that is specifically intended by the
21 defendant to cause substantial injury to the claimant; or

22 (B) an act that is carried out by the defendant
23 with a flagrant disregard for the rights of others and with actual
24 awareness on the part of the defendant that the act will, in
25 reasonable probability, result in human death, great bodily harm,
26 or property damage.

1 Sec. 41.002. APPLICABILITY. (a) This chapter applies to an
2 action in which a claimant seeks exemplary damages relating to a
3 cause of action as defined by Section 33.001.

4 (b) This chapter does not apply to:

5 (1) an action brought under the Deceptive Trade
6 Practices-Consumer Protection Act (Subchapter E, Chapter 17,
7 Business & Commerce Code);

8 (2) an action brought under Chapter 21, Insurance
9 Code;

10 (3) an action brought under the workers' compensation
11 laws of this state (Article 8306 et seq., Revised Statutes);

12 (4) an action to recover exemplary damages against an
13 employer by the employee's beneficiaries in a death action arising
14 out of the course and scope of employment where the employer is a
15 subscriber under the workers' compensation laws of this state
16 (Article 8306 et seq., Revised Statutes);

17 (5) an action governed by Chapter 81, Civil Practice
18 and Remedies Code;

19 (6) an action brought under Chapter 246, Acts of the
20 63rd Legislature, Regular Session, 1973, Home Solicitation
21 Transactions (Article 5069-13.01 et seq., Vernon's Texas Civil
22 Statutes);

23 (7) an action brought under Chapter 547, Acts of the
24 63rd Legislature, Regular Session, 1973, Debt Collection Practices
25 (Article 5069-11.01 et seq., Vernon's Texas Civil Statutes);

26 (8) an action brought under Chapter 54, 91, or 92,

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- 1 Property Code;
- 2 (9) an action brought under the Texas Manufactured
- 3 Housing Standards Act (Article 5221f, Vernon's Texas Civil
- 4 Statutes);
- 5 (10) an action brought under the Texas Motor Vehicle
- 6 Commission Code (Article 4413(36), Vernon's Texas Civil Statutes);
- 7 (11) an action brought under the Texas Proprietary
- 8 School Act, Chapter 32, Education Code;
- 9 (12) an action brought under Section 9.507 or Section
- 10 27.01, Business & Commerce Code;
- 11 (13) an action brought under Chapter 36, Family Code;
- 12 (14) an action brought under the Health Spa Act
- 13 (Article 52211, Vernon's Texas Civil Statutes);
- 14 (15) an action brought under the Business Opportunity
- 15 Act (Article 5069-16.01 et seq., Vernon's Texas Civil Statutes); or
- 16 (16) an action brought under the Texas Timeshare Act
- 17 (Article 6573c, Vernon's Texas Civil Statutes).
- 18 (c) In an action to which this chapter applies, the
- 19 provisions of this chapter prevail over all other law to the extent
- 20 of any conflict.
- 21 Sec. 41.003. STANDARDS FOR RECOVERY OF EXEMPLARY DAMAGES.
- 22 (a) Exemplary damages may be awarded only if the claimant proves
- 23 that the personal injury, property damage, death, or other harm
- 24 with respect to which the claimant seeks recovery of exemplary
- 25 damages results from:
- 26 (1) fraud;

- 1 (2) malice; or
- 2 (3) gross negligence.

3 (b) The claimant must prove the elements of Subsection
 4 (a)(1), (a)(2), or (a)(3). This burden of proof may not be shifted
 5 to the defendant or satisfied by evidence of ordinary negligence.

6 Sec. 41.004. FACTORS PRECLUDING RECOVERY. (a) Exemplary
 7 damages may be awarded only if damages other than nominal damages
 8 are awarded.

9 (b) Exemplary damages may not be awarded to a claimant who
 10 elects to have his recovery multiplied under another statute.

11 Sec. 41.005. AWARD SPECIFIC TO DEFENDANT. In any action in
 12 which there are two or more defendants, an award of exemplary
 13 damages must be specific as to a defendant, and each defendant is
 14 liable only for the amount of the award made against that
 15 defendant.

16 Sec. 41.006. PREJUDGMENT INTEREST. Prejudgment interest may
 17 not be assessed or recovered on an award of exemplary damages.

18 Sec. 41.007. LIMITATION ON AMOUNT OF RECOVERY. Except as
 19 provided by Section 41.008, exemplary damages awarded against a
 20 defendant may not exceed four times the amount of actual damages or
 21 \$200,000, whichever is greater.

22 Sec. 41.008. EXCEPTION. Section 41.007 does not apply to
 23 exemplary damages resulting from malice as defined by Section
 24 41.001(6)(A) or to an intentional tort.

25 Sec. 41.009. PROVISIONS NOT TO BE MADE KNOWN TO JURY. The
 26 provisions of Section 41.007 may not be made known to the jury

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1 through any means, including voir dire, introduction into evidence,
2 or instruction.

3 ARTICLE 3

4 SECTION 3.01. Title 4, Civil Practice and Remedies Code, is
5 amended by adding Chapter 81 to read as follows:

6 CHAPTER 81. LIABILITY OF DRUG

7 MANUFACTURERS AND SELLERS

8 Sec. 81.001. DEFINITIONS. In this chapter:

9 (1) "Claimant" means a party, including a plaintiff,
10 counterclaimant, cross-claimant, or third-party plaintiff, seeking
11 recovery of exemplary damages. In an action in which a party seeks
12 recovery of exemplary damages related to injury to another person,
13 damage to the property of another person, death of another person,
14 or other harm to another person, "claimant" includes both that
15 other person and the party seeking recovery of exemplary damages.

16 (2) "Defendant" means a party, including a
17 counterdefendant, cross-defendant, or third-party defendant, from
18 whom a claimant seeks relief with respect to exemplary damages.

19 (3)(A) "Drug" means:

20 (i) an article included in the definition
21 of "drug" in the federal Food, Drug, and Cosmetic Act (21 U.S.C.
22 Section 321(g)(1)) which has been approved for marketing by the
23 Food and Drug Administration pursuant to 21 U.S.C. Section 355 or
24 357, or Section 351 of the Public Health Service Act (42 U.S.C.
25 Section 262);

26 (ii) an article included in the definition

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1 of "drug" in the federal Food, Drug, and Cosmetic Act (21 U.S.C.
2 Section 321(g)(1)) which is exempt from the requirements of 21
3 U.S.C. Section 355 or 357 pursuant to the provisions of 21 U.S.C.
4 Section 321(p)(1) and is recognized as safe and effective under
5 regulations established by the federal Food and Drug
6 Administration; or

7 (iii) childhood vaccines, including a
8 vaccine that is intended to confer immunity against diphtheria,
9 tetanus, pertussis, polio, measles, mumps, or rubella, or any
10 combination of these diseases.

11 (B) The term "drug" as defined in Paragraph (A)
12 of this subdivision does not include devices or their components,
13 parts, or accessories as defined by 21 U.S.C. Section 321(h), or
14 blood, blood components, or blood derivatives.

15 (4) "Drug-related injury" means any injury,
16 disability, illness, or condition caused by a drug.

17 (5) "Exemplary damages" means any damages awarded as
18 an example to others, as a penalty, or by way of punishment.
19 "Exemplary damages" includes punitive damages.

20 (6) "Manufacturer" means a person, including an
21 officer, director, employee, or agent acting within the scope of
22 the officer's, director's, employee's, or agent's employment or
23 agency, that produces a drug or that purchases and resells as the
24 person's own product a drug produced by another person.

25 Sec. 81.002. APPLICABILITY. (a) This chapter applies to an
26 action in which a claimant seeks damages from a manufacturer for a

1 drug-related injury, including actions based on negligence, strict
2 tort liability, products liability (strict or otherwise), or breach
3 of warranty.

4 (b) This chapter does not apply to the Deceptive Trade
5 Practices-Consumer Protection Act (Subchapter E, Chapter 17,
6 Business & Commerce Code).

7 Sec. 81.003. LIMITATION ON RECOVERY. (a) Except as
8 provided by Subsection (b), in an action against a manufacturer for
9 a drug-related injury, a claimant shall not recover exemplary
10 damages if the drug was:

11 (1) manufactured and labeled in accordance with the
12 terms of an approval or license issued by the federal Food and Drug
13 Administration under the federal Food, Drug, and Cosmetic Act
14 (Chapter 9, Title 21, U.S.C.) or the Public Health Service Act
15 (Chapter 6A, Title 42, U.S.C.); or

16 (2) recognized as safe and effective pursuant to
17 conditions established by the federal Food and Drug Administration
18 and applicable regulations, including packaging and labeling
19 regulations, and the drug was designed, tested, manufactured, and
20 marketed in a reasonable manner.

21 (b) Subsection (a) does not apply to a claimant who
22 establishes by a preponderance of the evidence that the defendant
23 was grossly negligent or committed an intentional tort and:

24 (1) fraudulently or knowingly in violation of
25 applicable regulations of the federal Food and Drug Administration
26 withheld from or misrepresented to the agency information known to

1 be material and relevant to the drug-related injury for which the
2 claimant seeks recovery;

3 (2) knew or had access to information from which
4 knowledge of the consequences could have been obtained at the time
5 of distributing the drug that is alleged to have caused injury to
6 the claimant that it posed a significant risk of serious harm or
7 serious, adverse side effects to intended users and failed to
8 report same in writing within a reasonable time to the Food and
9 Drug Administration prior to the distribution of said drug; or

10 (3) knew or had access to information from which
11 knowledge of the consequences could have been obtained at the time
12 of distributing the drug that is alleged to have caused the
13 claimant's injury that technology was available to alter the drug
14 to eliminate or reduce a significant risk of serious harm or
15 serious side effects to intended users and that the alteration
16 would not have had the effect of making the drug less marketable
17 due to the economic infeasibility of manufacturing the final
18 altered drug product, and failed to report same in writing within a
19 reasonable time to the Food and Drug Administration prior to the
20 distribution of said drug.

21 SECTION 3.02. Chapter 101, Civil Practice and Remedies Code,
22 is amended by adding Section 101.0215 to read as follows:

23 Sec. 101.0215. LIABILITY OF A MUNICIPALITY. (a) A
24 municipality is liable under this chapter for damages arising from
25 its governmental functions, which are those functions that are
26 enjoined on a municipality by law and are given it by the state as

- 1 part of the state's sovereignty, to be exercised by the
2 municipality in the interest of the general public, including but
3 not limited to:
- 4 (1) police and fire protection and control;
 - 5 (2) health and sanitation services;
 - 6 (3) street construction and design;
 - 7 (4) bridge construction and maintenance and street
8 maintenance;
 - 9 (5) cemeteries and cemetery care;
 - 10 (6) garbage and solid waste removal, collection, and
11 disposal;
 - 12 (7) establishment and maintenance of jails;
 - 13 (8) hospitals;
 - 14 (9) sanitary and storm sewers;
 - 15 (10) airports;
 - 16 (11) waterworks;
 - 17 (12) repair garages;
 - 18 (13) parks and zoos;
 - 19 (14) museums;
 - 20 (15) libraries and library maintenance;
 - 21 (16) civic, convention centers, or coliseums;
 - 22 (17) community, neighborhood, or senior citizen
23 centers;
 - 24 (18) operation of emergency ambulance service;
 - 25 (19) dams and reservoirs;
 - 26 (20) warning signals;

- 1 (21) regulation of traffic;
- 2 (22) transportation systems;
- 3 (23) recreational facilities, including but not
- 4 limited to swimming pools, beaches, and marinas;
- 5 (24) vehicle and motor driven equipment maintenance;
- 6 (25) parking facilities;
- 7 (26) tax collection;
- 8 (27) firework displays;
- 9 (28) building codes and inspection;
- 10 (29) zoning, planning, and plat approval;
- 11 (30) engineering functions;
- 12 (31) maintenance of traffic signals, signs, and
- 13 hazards;
- 14 (32) water and sewer service; and
- 15 (33) animal control.

16 (b) This chapter does not apply to the liability of a
 17 municipality for damages arising from its proprietary functions,
 18 which are those functions that a municipality may, in its
 19 discretion, perform in the interest of the inhabitants of the
 20 municipality, including but not limited to:

- 21 (1) the operation and maintenance of a public utility;
- 22 (2) amusements owned and operated by the municipality;
- 23 and
- 24 (3) any activity that is abnormally dangerous or
- 25 ultrahazardous.

26 (c) The proprietary functions of a municipality do not

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1 include those governmental activities listed under Subsection (a).

2 SECTION 3.03. Section 101.023, Civil Practice and Remedies
3 Code, is amended by amending Subsection (b) and by adding
4 Subsection (c) to read as follows:

5 (b) Except as provided by Subsection (c), liability
6 [Liability] of a unit of local government under this chapter is
7 limited to money damages in a maximum amount of \$100,000 for each
8 person and \$300,000 for each single occurrence for bodily injury or
9 death and \$100,000 for each single occurrence for injury to or
10 destruction of property.

11 (c) Liability of a municipality under this chapter is
12 limited to money damages in a maximum amount of \$250,000 for each
13 person and \$500,000 for each single occurrence for bodily injury or
14 death and \$100,000 for each single occurrence for injury to or
15 destruction of property.

16 SECTION 3.04. Subsection (a), Section 101.053, Civil
17 Practice and Remedies Code, is amended to read as follows:

18 (a) This chapter does not apply to a claim based on an act
19 or omission of a court of this state or any member of a court of
20 this state acting in his official capacity or to a judicial
21 function of a governmental unit. "Official capacity" means all
22 duties of office and includes administrative decisions or actions.

23 SECTION 3.05. Section 101.055, Civil Practice and Remedies
24 Code, is amended to read as follows:

25 Sec. 101.055. CERTAIN GOVERNMENTAL FUNCTIONS. This chapter
26 does not apply to a claim arising:

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1 (1) in connection with the assessment or collection of
2 taxes by a governmental unit;

3 (2) from the action of an employee while responding to
4 an emergency call or reacting to an emergency situation if the
5 action is in compliance with the laws and ordinances applicable to
6 emergency action, or in the absence of such a law or ordinance, if
7 the action is taken with conscious indifference or reckless
8 disregard for the safety of others; or

9 (3) from the failure to provide or the method of
10 providing police or fire protection.

11 SECTION 3.06. Subsection (a), Section 101.102, Civil
12 Practice and Remedies Code, is amended to read as follows:

13 (a) A suit under this chapter shall be brought in state
14 court in the county in which the cause of action or a part of the
15 cause of action arises.

16 SECTION 3.07. Section 102.001, Civil Practice and Remedies
17 Code, is amended to read as follows:

18 Sec. 102.001. DEFINITIONS. In this chapter:

19 (1) "Employee" includes an officer, volunteer, or
20 employee, a former officer, volunteer, or employee, and the estate
21 of an officer, volunteer, or employee or former officer, volunteer,
22 or employee of a local government.

23 (2) "Local government" means a county, city, town,
24 special purpose district, and any other political subdivision of
25 the state.

26 SECTION 3.08. Section 104.001, Civil Practice and Remedies

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1 Code, is amended to read as follows:

2 Sec. 104.001. STATE LIABILITY; PERSONS COVERED. In a cause
3 of action based on conduct described in Section 104.002, the state
4 shall indemnify the following persons [~~is--liable~~] for actual
5 damages, court costs, and attorney's fees adjudged against:

6 (1) an employee, a member of the governing board, or
7 any other officer of a state agency, institution, or department;

8 (2) a former employee, former member of the governing
9 board, or any other former officer of a state agency, institution,
10 or department who was an employee or officer when the act or
11 omission on which the damages are based occurred;

12 (3) a physician or psychiatrist licensed in this state
13 who was performing services under a contract with the Disability
14 Determination Division of the Texas Rehabilitation Commission, [~~or~~
15 ~~the~~] Texas Department of Mental Health and Mental Retardation,
16 Texas Youth Commission, Texas Department of Corrections, or Texas
17 Department of Health when the act or omission on which the damages
18 are based occurred;

19 (4) a person serving on the governing board of a
20 foundation, corporation, or association at the request and on
21 behalf of an institution of higher education, as that term is
22 defined by Section 61.003(8), Education Code [~~The-University-of~~
23 ~~Texas-System~~]; or

24 (5) the estate of a person listed in this section.

25 SECTION 3.09. Section 104.002, Civil Practice and Remedies
26 Code, is amended to read as follows:

1 Sec. 104.002. STATE LIABILITY; CONDUCT COVERED. The state
 2 is liable for indemnification under this chapter only if the
 3 damages are based on an act or omission by the person in the course
 4 and scope of the person's office, employment, or contractual
 5 performance for or service on behalf of the agency, institution, or
 6 department and if:

7 (1) the damages arise out of a cause of action for
 8 negligence, except a wilful or wrongful act or an act of gross
 9 negligence; or

10 (2) the damages arise out of a cause of action for
 11 deprivation of a right, privilege, or immunity secured by the
 12 constitution or laws of this state or the United States, except
 13 when the court in its judgment or the jury in its verdict finds
 14 that the person acted in bad faith, with conscious indifference or
 15 reckless disregard; or

16 (3) indemnification is in the interest of the state as
 17 determined by the attorney general or his designee.

18 SECTION 3.10. Subsection (a), Section 104.003, Civil
 19 Practice and Remedies Code, is amended to read as follows:

20 (a) State liability for indemnification under this chapter
 21 may not exceed:

22 (1) \$100,000 to a single person and \$300,000 for a
 23 single occurrence in the case of personal injury, death, or
 24 deprivation of a right, privilege, or immunity; and

25 (2) \$10,000 for a single occurrence of damage to
 26 property.

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1 SECTION 3.11. Subsection (a), Section 104.004, Civil
2 Practice and Remedies Code, is amended to read as follows:

3 (a) The attorney general shall defend a public servant [an
4 individual] or estate listed in Section 104.001 in a cause of
5 action covered by this chapter.

6 SECTION 3.12. Title 5, Civil Practice and Remedies Code, is
7 amended by adding Chapter 107 to read as follows:

8 CHAPTER 107. LIMITATION OF LIABILITY FOR PUBLIC SERVANTS

9 Sec. 107.001. DEFINITION. In this chapter, "public servant"
10 means a person covered by Section 104.001.

11 Sec. 107.002. LIMITATION OF LIABILITY. A public servant is
12 not personally liable for damages to the extent that the state is
13 liable for indemnification under Section 104.002 that are the
14 result of an act or omission by the public servant in the course
15 and scope of the public servant's office, employment, or
16 contractual performance for or service on behalf of a state agency,
17 institution, or department.

18 Sec. 107.003. STATE LIABILITY NOT AFFECTED. This chapter
19 does not affect the liability of the state under Chapter 104.

20 SECTION 3.13. Section 101.058, Civil Practice and Remedies
21 Code, is repealed.

22 ARTICLE 4. MISCELLANEOUS PROVISIONS; TRANSITION

23 SECTION 4.01. DECLARATORY JUDGMENT. (a) The validity of
24 this Act or any part of this Act may be determined in an action for
25 declaratory judgment in a district court in Travis County pursuant
26 to the Uniform Declaratory Judgments Act (Chapter 37, Civil

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1 Practice and Remedies Code) if it is alleged that this Act or a
2 part of this Act affects the rights, status, or legal relation of a
3 party in a civil action with respect to any other party in the
4 civil action.

5 (b) Any appeal of a declaratory judgment of a district
6 court, including an appeal of the judgment of an appellate court,
7 holding this Act or any part of this Act valid or invalid under the
8 state or federal constitution shall be an accelerated appeal.

9 , SECTION 4.02. ACCELERATED APPEAL. An appeal of a judgment
10 or order of a county or district court or a judgment of an
11 appellate court holding this Act or a portion of this Act valid or
12 invalid under the state or federal constitution shall be an
13 accelerated appeal.

14 SECTION 4.03. ACCELERATED APPEALS; RULES. An accelerated
15 appeal, including an appeal to the supreme court, under Subsection
16 (b) of Section 4.01 or under Section 4.02 of this Act shall be
17 governed by Rule 42, Texas Rules of Appellate Procedure.

18 SECTION 4.04. SEVERABILITY. (a) Except as provided by
19 Subsection (b) of this section, if any provision of this Act or its
20 application to any person or circumstance is held invalid, the
21 invalidity does not affect other provisions or applications of this
22 Act that can be given effect without the invalid provision or
23 application, and to this end the provisions of this Act are
24 declared to be severable.

25 (b) If a provision of Section 3.02 of this Act is held
26 invalid or its application to any person or circumstance is held

1 invalid, Sections 3.02, 3.03, and 3.13 of this Act are void and
 2 have no effect. If a provision of Section 3.03 of this Act is held
 3 invalid or its application to any person or circumstance is held
 4 invalid, Sections 3.02, 3.03, and 3.13 of this Act are void and
 5 have no effect. If a provision of Section 3.13 of this Act is held
 6 invalid, Sections 3.02, 3.03, and 3.13 of this Act are void and
 7 have no effect. All other sections of this Act are severable as
 8 provided in Subsection (a) of this section.

9 SECTION 4.05. EFFECTIVE DATE. (a) Sections 2.01 through
 10 2.12 and Article 3 of this Act apply only to suits filed on or
 11 after the effective date of this Act.

12 (b) If all or any part of a suit is filed before the
 13 effective date of this Act, the entire suit shall be governed with
 14 respect to the subject matter of Sections 2.01 through 2.12 and
 15 Article 3 of this Act by the applicable law in effect before that
 16 date, and that law is continued in effect only for this purpose,
 17 including any new trial or retrial of any such suit following
 18 appeal of the trial court's judgment.

19 (c) In actions in which a statute requires that a written
 20 notice be given to any person or entity prior to filing suit, the
 21 delivery of any such notice or the depositing of such a notice,
 22 postage prepaid, in the United States mail before the effective
 23 date of this Act shall constitute the filing of suit for the
 24 purposes of this section, provided that the suit is filed within
 25 120 days after the notice is delivered or mailed, and such suits
 26 shall be governed with respect to the subject matter of Sections

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1 2.01 through 2.12 and Article 3 of this Act by the applicable law
2 in effect before that date, and that law is continued in effect
3 only for this purpose, including any new trial or retrial of any
4 such suit following appeal of the trial court's judgment.

5 SECTION 4.06. This Act takes effect only if S.B. 2, 70th
6 Legislature, 1st Called Session, 1987, is enacted and becomes law.

7 SECTION 4.07. The importance of this legislation and the
8 crowded condition of the calendars in both houses create an
9 emergency and an imperative public necessity that the
10 constitutional rule requiring bills to be read on three several
11 days in each house be suspended, and this rule is hereby suspended.